FILED
MAY 18 1989
JOSEPH F. SPANIOL, JR
CLERK

No. 88-1454

# In the Supreme Court of the United States

OCTOBER TERM, 1988

VERNON HOWARD BARNES, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

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12 pp

## QUESTIONS PRESENTED

1. Whether the participation by local and federal law enforcement authorities in interstate telephone calls in which petitioner threatened to injure other persons resulted in the improper creation of federal jurisdiction for purposes of 18 U.S.C. 875(c).

2. Whether there was sufficient evidence for purposes of 18 U.S.C. 875(c) to show that petitioner's threats on the telephone had a reasonable tendency to create an apprehension that petitioner would act on those threats.

3. Whether the failure by the court of appeals to publish an opinion in this case violated the Due Process Clause of the Fifth Amendment.

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## OPINIONS BELOW

The judgment order of the court of appeals affirming petitioner's conviction (Pet. App. A) is unreported. The decision of the district court is also unpublished.

## JURISDICTION

The judgment of the court of appeals was entered on September 15, 1988. A petition for rehearing was denied on January 3, 1989. The petition for a writ of certiorari was filed on March 3, 1989. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioner was convicted on two counts of making threats in interstate com-

munications, in violation of 18 U.S.C. 875(c). He was sentenced to five years' imprisonment on the first count; the sentence on the second count was suspended. The district court later reduced the sentence on the first count to six months' imprisonment. The court of appeals affirmed.

1. Petitioner and Richard Shipman had a homosexual relationship and lived together for seven years, primarily in Florida. Shipman broke off their relationship in August 1986, but petitioner sought to reestablish it. In a general effort to make contact with Shipman, petitioner telephoned Shipman's sisters, who lived in Georgia. Petitioner threatened Shipman's sisters, insisting that they use their influence to have Shipman return to petitioner.

During the first week of November 1986, one of Shipman's sisters, Sherry Schriner, learned that threats had been directed at her family, and shortly after midnight on November 5, 1986, a bomb went off in Mrs. Shriner's driveway. Her teen-age daughter became hysterical, and Schriner immediately called the local law enforcement authorities. Gov't C.A. Br. 3-5.

Schriner, who knew petitioner, told the police that petitioner had said it would be all right for her to call him. At the suggestion of the police, Schriner called petitioner at his home in Florida and recorded the conversation. During that conversation, petitioner made repeated threats to the safety of Schriner's family. Petitioner said that he had a "strong family tie" with the Mafia, and that Schriner had "best be looking over [her] shoulders" until she got her brother "to cooperate." Petitioner added that "the warnings [were] over" because the "[n]ext time [it would be] worse," and that if Richard Shipman did not "make amends with [petitioner] then [Richard Shipman] and [Schriner's] family [would] have to live with whatever hap-

pens." After that conversation, according to her testimony, Schriner felt "very threatened." Gov't C.A. Br. 5-11.

Petitioner also threatened Victoria Hales, Shipman's other sister. Hales called petitioner at the suggestion of a federal agent and spoke with him on November 20, 1986. Later the same day, petitioner called back and told Hales that her brother was "gonna be the one to be destroyed," that somebody was "gonna die," that petitioner's father was a kingpin in the Mafia, and that all the "threats and bombs" would stop if Hales' brother went back to petitioner. Petitioner added that Hales was not "mentally strong enough to handle the guilt of having one of you shot * * *." During that conversation, Hales was in Georgia and petitioner was in Florida.

2. The threats that petitioner made in the course of those two conversations formed the basis for two of the counts charging petitioner with making threats during an interstate telephone conversation, in violation of 18 U.S.C. 875(c).[1] Before trial, petitioner moved to dismiss those charges, claiming that the local and federal authorities had "manufactured" federal jurisdiction. The magistrate, while noting that "[t]he facts in the instant case [did] not neatly fit any of the authorities cited [by petitioner]," nevertheless recommended that the two counts be dismissed, because the "calls charged in the indictment * * * were made at the direction and suggestion of the government agent." Magistrate Order 7, 10.

The district court rejected the magistrate's recommendation. The court noted that in this case the government did not unilaterally supply the interstate element of the of-

[1] The grand jury also indicted petitioner for three other interstate communications that allegedly took place on November 9, 10, and 20, 1986, but petitioner was acquitted on those counts. Pet. 5.

fense, because "[n]either the agents nor the victims went out of state for the purpose of making the interstate call and creating the federal jurisdiction." Opinion 3. As the district court explained, "[t]he agents here did not provoke interstate activity where it otherwise might not have existed—the defendant's previous alleged threats, as well as the threats alleged in [other counts], demonstrated his willingness to make such threats regardless of their interstate character." Opinion 3-4 (footnote omitted). As the district court put it, "the interstate element of the offense in this case was supplied by the defendant and the victims, not by the government." Opinion 3.

3. The court of appeals summarily affirmed without an opinion. Pet. App. A.

## ARGUMENT

1. Petitioner first argues (Pet. 6-18) that the indictment should have been dismissed because law enforcement authorities improperly manufactured federal jurisdiction in this case. Petitioner specifically contends (Pet. 13-15) that, as a matter of statutory construction, when law enforcement authorities have directed the initiation of the communication, jurisdiction is manufactured and any threat that occurs during the course of an ensuing conversation cannot amount to a violation of 18 U.S.C. 875 (1982 ed.). Section 875(c), however, applies whenever a defendant "transmits in interstate commerce any communication containing * * * any threat to injure the person of another." 18 U.S.C. 875(c). That language encompasses threats such as the ones in this case, which were "transmit[ted]" during an interstate telephone conversation, even though the person making the threats was not the party who initiated the telephone call.

Petitioner suggests (Pet. 14-16) that the ruling below conflicts with the Second Circuit's decision in *United States* v. *Archer*, 486 F.2d 670 (1973).[2] There, federal agents were investigating the nature and extent of corruption in the New York criminal justice system. To bring the criminal activities they discovered within the ambit of the Travel Act, 18 U.S.C. 1952, the agents created opportunities to make interstate telephone calls, even though the crimes were not otherwise interstate in nature. For example, two of the agents traveled to Newark, New Jersey, to place telephone calls to one of the suspects in New York for the sole purpose of creating federal jurisdiction. 486 F.2d at 672-674. The Second Circuit held that Congress had not intended such "manufactured" federal jurisdiction to fall within the scope of the Travel Act, and the court therefore reversed the defendants' convictions. *Id.* at 678-683, 685-686.

Unlike the agents in *Archer*, the law enforcement officers in this case did not artificially convert local activity into an interstate crime. Shipman's sisters lived in Georgia,

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[2] Petitioner also claims that the *Archer* decision conflicts with *United States* v. *Petit*, 841 F.2d 1546 (11th Cir.), cert. denied, 108 S. Ct. 2906 (1988), but that contention is without merit. The court in *Petit* noted that "federal courts have been extremely reluctant to set aside convictions on the sole basis of the principle announced in *Archer*," 841 F.2d at 1553, but in making that point, the court simply recognized that *Archer* has been given a narrow reading by all the courts of appeals, including the Second Circuit. See *United States* v. *Podolsky*, 798 F.2d 177, 180 (7th Cir. 1986); *United States* v. *Zambrano*, 776 F.2d 1091, 1098-1099 (2d Cir. 1985); *United States* v. *Lau Tung Lam*, 714 F.2d 209, 210 (2d Cir.), cert. denied, 464 U.S. 942 (1983); *United States* v. *Romano*, 706 F.2d 370, 373-374 (2d Cir. 1983); *United States* v. *Bagnariol*, 665 F.2d 877, 898 n.15 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982); *United States* v. *Gambino*, 566 F.2d 414 (2d Cir. 1977), cert. denied, 435 U.S. 952 (1978); *United States* v. *LeFaivre*, 507 F.2d 1288, 1293 (4th Cir. 1974), cert. denied, 420 U.S. 1004 (1975).

and petitioner lived in Florida, and during the period of the crimes, petitioner and the sisters made a number of telephone calls back and forth between the two States. The officers did not, for example, transport the sisters across state lines to establish federal jurisdiction.

The difference in the jurisdictional elements of the two crimes is also significant. The federal jurisdictional element under the Travel Act, the statute at issue in *Archer*, was the simple "use" of the telephone in interstate commerce. By contrast, under 18 U.S.C. 875 federal jurisdiction arises only when the defendant "transmits in interstate commerce any communication * * * containing any threat to injure [a] person." Consequently, the agents here did not establish federal jurisdiction by merely calling petitioner (as the agents did in *Archer*); rather, federal jurisdiction arose only when petitioner himself threatened Shipman's sisters on the telephone. Cf. *United States* v. *Romano*, 706 F.2d 370, 373-374 (2d Cir. 1983) ("The effort to manufacture jurisdiction in *Archer* is vastly different from an offer to sell heroin which resulted in appellants' voluntary travel to the United States to consummate the sale.").

Finally, the telephone calls in this case were not made for the purpose of establishing federal jurisdiction, but were part of a legitimate investigation of the bombing and threats to members of Shipman's family. Unlike the federal authorities in *Archer*, who initated their investigation without any evidence of federal jurisdiction, the federal authorities here became involved only after local police had determined that the threats were in fact interstate and therefore provided grounds for federal jurisdiction. See Pet. 10-11. The fact that petitioner chose to make threats during the telephone calls that Shipman's sisters were recording does not reflect an intention to "create" federal jurisdiction, but rather was simply the natural fruit of a legitimate criminal investigation.



2. Petitioner also argues (Pet. 18-22) that there was insufficient evidence to prove a violation of 18 U.S.C. 875(c). Petitioner concedes that he made the telephone calls in question, but he claims that Sherry Schriner and Victoria Hales should not have felt threatened, because they knew petitioner. That fact-specific issue merits no further review.

Under Section 875, it is not "necessary to show that the threat induced fear in the person threatened." *United States* v. *Holder*, 302 F. Supp. 296, 301 (D. Mont. 1969), aff'd, 427 F.2d 715 (9th Cir. 1970). Instead, the government need only show that the threat has "a reasonable tendency to create apprehension that its originator will act according to its tenor." *United States* v. *Bozeman*, 495 F.2d 508, 510 (5th Cir. 1974), cert. denied, 422 U.S. 1044 (1975) (citation omitted). Here, the threats followed a frightening bomb explosion in Schriner's driveway, which caused her daughter to become hysterical. And although petitioner was in Florida, he repeated many times that he had strong connections with the Mafia and that the Mafia would kill members of Richard Shipman's family to "destroy" Shipman. He told Schriner that she should be looking over her shoulders until she got her brother to cooperate and that the warnings were over because the next time it would be worse. And he told Hales that somebody was "gonna die" and that the threats and bombs would stop if Shipman went back to petitioner. Gov't C.A. Br. 5-11, 17-20. As a result of the first conversation, Schriner testified that she felt "very threatened" for both herself and members of her family. Gov't C.A. Br. 11. That evidence was sufficient to show that petitioner's threats had a reasonable tendency to create apprehension that petitioner would act on his threats, either directly or through others.

3. Petitioner finally argues (Pet. 22-23) that his due process rights were violated because the court of appeals affirmed his conviction in an order without issuing a published opinion. That contention is meritless. The right to appeal provided to a defendant by 28 U.S.C. 1291 entitles him to no more than an independent review of the district court's judgment by the court of appeals, which petitioner received. "The fact that a disposition is by informal summary order rather than by formal published opinion in no way indicates that less than adequate consideration has been given to the claims raised in the appeal." *Furman* v. *United States,* 720 F.2d 263, 265 (2d Cir. 1983). See also *NLRB* v. *Amalgamated Clothing Workers, Local 990,* 430 F.2d 966 (5th Cir. 1970).[3] Requiring the courts of appeals to publish a written opinion in every case would impose a significant and needless burden on the courts, especially because many appeals are frivolous or have little merit. As this Court has recognized, "the courts of appeals should have wide latitude in their decisions of whether or how to write opinions," which is "especially true with respect to summary affirmances." *Taylor* v. *McKeithen,* 407 U.S. 191, 194 n.4 (1972).

[3] Petitioner errs in claiming that a summary affirmance order prevents a defendant from seeking review in this Court. A defendant has the opportunity to develop the issues raised before the court of appeals in a petition for writ of certiorari, and this Court can decide based on that petition whether review is warranted.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MAY 1989

U.S. GOVERNMENT PRINTING OFFICE 1989—241 699/00261